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Supreme Court of the United States

October Term, 1967

No. 968

BANCO NACIONAL DE CUBA,

Petitioner,

against

F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & CO.,

against

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA and LEHMAN BROTHERS.

PETITION FOR REHEARING

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March 27, 1968.

Supreme Court of the United States

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F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & CO.,

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Petition for Rehearing

Petitioner prays that this Court grant rehearing of its order of March 4, 1968, denying the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on July 31, 1967, and that the petition for certiorari be granted.

Reasons for Granting Rehearing and Issuing the Writ

Substantial grounds available to the petitioners and not previously presented exist in this case within the meaning of Rule 58 of the Court, in that statements of law appearing in respondents' brief in opposition to the writ call for a more complete response, here made for the first time and because there are other substantial grounds available to the petitioner not previously presented.

I

This Court's denial of the petition will leave standing the Court of Appeals ruling that, in treating the nationalization of corporate property within the territory of the nationalizing state, the courts may ignore the corporate identity of the nationalized company and may look instead to the presumed nationality of its stockholders. Such a conclusion flies in the face of the universal practice of all nations in the area of international law and is productive of endless mischief. It is not required by the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) and there is no evidence that Congress intended such a result.

The Court of Appeals cited no authority in support of its conclusion (at 383 F. 2d 185) that the corporate identity should be ignored. Instead, it repeated "with emphasis" its language in *Banco Nacional* v. *Sabbatino*, 307 F. 2d 845, at 861:

> "When a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for us in passing on the validity of that treatment to look only to the 'nationality' of the corporate fiction."

But it is clear that Cuba did not treat C.A.V. "in a particular way because of the nationality of its shareholders". Whatever may have been the rhetoric of the particular nationalization decree, the fact is, as the world knows, that Cuba treated all corporations within its territory in the same way, whether they were owned by United States citizens or Cubans. See, for example, *F. Palicio y Compania* v. *Brush & Bloch*, 256 F. Supp. 481 (S.D.N.Y. 1966), affd. 375 F. 2d 1011 (2d Cir. 1967); cert. den. 389 U.S. 830.

C.A.V. chose to incorporate in Cuba. In so doing it avoided many obligations to the United States—for instance, the obligation to pay taxes. In the absence of

clear authority requiring the disregard of the corporate structure or an unequivocal direction from Congress, it should not now be permitted to hide behind the flag of the United States. We find neither any such clear authority nor such direction from Congress.

The Court of Appeals cited no authority in support of its conclusion that the corporate identity should be ignored. However, in its opinion in the *Sabbatino* case (307 F. 2d at 861), it did cite a number of authorities as so holding. The respondent, in opposing the writ in this case, relied on two of those cases, namely, *Delgoa Bay Railway Co.* [1902], For. Rel. U. S. 848 and *El Triunfo* [1902] For. Rel. U. S. 859.

We cannot in the present posture of this case embark upon a full scale analysis of these and similar cases. Admittedly they are difficult to read and most complex in their presentation of the facts, but we submit that no one who examines this and other similar litigation can come to the conclusion reached by the Court of Appeals and the respondent. The *Delgoa* and *El Triunfo* cases are perhaps typical of many cases. In both cases the United States, acting in a diplomatic, not a judicial forum, made claims *only* on behalf of United States stockholders of foreign corporations; in both cases the issue of damages to the stockholders was submitted to arbitration under an agreement; in neither case was there any consideration of the rights of the corporation or of its nationality. The scope of the arbitration and the issues before the arbitral tribunal would have been exactly the same whether United States citizens owned 1% or 99% of the stock of those companies.

The procedure followed in *Delgoa Bay* and *El Triunfo* could presumably be followed in the Cuban situation as well, not only as to C.A.V. but as to all other companies in which United States stockholders have an interest, if the time ever comes when Cuba and the United States can resolve to submit such matters to arbitration.

Nor was the Court of Appeals correct in concluding that in the *Standard Oil Tankers* case, 22 Amer. J. Int. L. 404, "... a sovereign took action against a corporation because of the nationality of the corporation and not because of the nationality of the shareholders" (383 F. 2d at 166). We do not know the motivation for Germany's action in that instance, but it is not unreasonable to assume that it was motivated at least in part by the fact that the German corporation whose property it used to pay reparations to the Allies was owned by a United States corporation. Certainly that was considered by the shareholders to be a fact of prime importance, and was the principal issue in the litigation that followed.

We suggest that it is dangerous to let questions of international law be determined by speculation as to the reasons which cause foreign governments to act as they do. Such a consideration will add but one additional difficulty in a field which already has too many.

Nor does the Hickenlooper Amendment require the result reached by the Court of Appeals. The holding we urge, namely, that C.A.V. be treated as a Cuban corporation, will leave plenty of room for the Hickenlooper Amendment to operate; many of the companies whose property was nationalized were incorporated in the United States, e.g., First National City Bank and Chase Manhattan Bank, and there is no reason to believe that Congress, in passing the statute, intended to cover other kinds of situations. Certainly the ambiguous reference in the Hickenlooper Amendment to "other standards set out in this subsection" [presumably a reference to 22 U.S.C. § 2370 (e)(1)] does not require the result reached here. Section 2370(e)(1) was passed at an earlier session of Congress. It bears no relation at all to the act of state doctrine; it merely provides that the President shall withhold foreign aid to any country which has nationalized the property of any corporation beneficially owned by United States citizens to the extent of

50% or more. Such a determination by Congress with respect to foreign aid certainly is no indication that Congress also intended to suspend the application of the act of state doctrine in such cases. If it had so intended, it could easily have said so. Its constant reiteration that it intended to conform to the principles of international law would indicate no intention to breach that law by disregarding the fundamental rule that a corporation is a citizen of the state of its incorporation.

II

The reasons for the act of state doctrine are set out in the *Sabbatino* case. Primary among them is the determination by this Court that there are sound reasons, dictated by the doctrine of separation of powers and by elements of judicial discretion, why it should not be required to pass upon the questions raised by an act of a foreign sovereign in nationalizing property within its own territory.

The incidence of the expropriation of the property of aliens in one form or another is likely to increase rather than decrease in the coming years. Given the economic position of the United States throughout the world, it is inevitable that United States corporations will find that their property will be among the property expropriated. The consequence may well be endless litigation presenting to this Court all of the problems which it sought to avoid in the *Sabbatino* case and the scores of cases which preceded it—problems which are primarily political and which come within the area usually reserved to the Executive Branch. We have argued that Congress has no power to direct the Judiciary in the exercise of its traditional power to abstain when a decision will, in its judgment, interfere with the separation of powers between the Judicial Branch and the Executive Branch or when the Court is confronted with a request that it decide a political question.

We know of no decision holding that Congress may direct the Court to make such a decision and certainly all of the reasoning in cases such as *Baker* v. *Carr*, 369 U.S. 186, would seem to indicate that a congressional direction to the Court under these circumstances would be inappropriate. Similarly, this Court in its decision in the *Sabbatino* case specifically referred to the doctrine of the separation of powers when it noted that the act of state doctrine had "constitutional underpinnings" (376 U. S. at 423).

The Court of Appeals, like the District Court, sought to meet this argument by reference to cases in which, it said:

> ". . . the courts have changed their position due to intervening federal legislation and have decided issues which they had formerly refused to decide. The cases involve issues substantially different from the issue in the case at bar but all show a judicial policy of deferring to legislative judgment when such a course is not barred by constitutional considerations." 383 F. 2d at 181

In support of this conclusion the court cited several cases in which such deference to legislative judgment is claimed to be manifested (see footnote 17 at p. 181). We do not believe that any of such cases are in point and we do not know of any other cases treating the issue.

Most of the cases cited illustrate a commonplace of jurisprudence. When on a given set of facts, a party has no standing to sue or for some other reason cannot allege a cause of action, the court will dismiss his complaint. If subsequently Congress amends the law giving plaintiff (or another plaintiff similarly situated) the capacity to sue or in some other way remedying the defect which caused the original dismissal, the Court, on the second time round, will defer to Congress. Thus, for example, *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U. S. 118, and *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, like *City of Atlanta* v. *Ickes*, 308 U. S. 517, are traditional cases in which actions were dis-

missed because plaintiff had no capacity to sue. Congress thereupon enacted legislation giving persons similarly situated the power to sue and in *Scripps Howard Radio, Inc.* v. *F. C. C.*, 316 U.S. 4 and *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2d Cir. 1943) that statute was enforced. This is fully discussed by Judge Frank in his opinion in *Associated Industries* v. *Ickes*, *supra*, at 703. Those cases bear no resemblance whatsoever to the instant case where this Court's decision (in *Sabbatino*) was not based upon a defect in capacity which was met by an act of Congress.

Similarly, we cannot see that a comparison between *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 and *Byers* v. *McAuley*, 149 U.S. 608, on the one hand, and *Markham* v. *Allen*, 326 U.S. 490, on the other, can be of any assistance to this Court. In the first case the Court found jurisdiction but felt that it should abstain from decision. Cf. *American Federation of Labor* v. *Watson*, 327 U.S. 582. The *Byers* case is one of jurisdiction as is *Markham*. In none of them was there a change in the position of the Court caused by the enactment of a statute.

Similarly, *Willing* v. *Chicago Auditorium*, 277 U.S. 274, and *Aetna Life Insurance Co.* v. *Howarth*, 300 U.S. 227, are quite irrelevant to the issues before this Court. In the first case the Court found no case or controversy and hence no jurisdiction; in the second case the Court found a controversy. There was no statute which conferred the jurisdiction which the Court found missing in the *Willing* case.

Basically, of course, the Court of Appeals begged the constitutional question raised by petitioner. It found that Congress had the right to direct the court to make decisions unless there is a constitutional impediment to such legislation. We argue that there is, indeed, a constitutional impediment to such litigation, namely, the separation of

powers clause which leaves to the courts alone the question of determining the justiciability of a question which is presented to it.

III

We are aware, of course, that a denial of a petition for certiorari is not a decision by this Court on the merits; however, in practical terms it will have a profound effect on the other Cuban litigation pending both in the Second Circuit and elsewhere, and will be widely interpreted by lower courts as dispositive of many of the issues in such litigation. It will mean that the other litigation will be more difficult and protracted than need otherwise be since the cases are of such importance that the litigants are likely to make further application to this Court for a final determination of the issues presented by this petition herein, some of which are discussed above.

It may be that after full briefing and argument before this Court the decision of the Court of Appeals would nevertheless be affirmed. We most respectfully suggest, however, that petitioner should have the opportunity to make such full presentation. Only in that way can the questions raised by the interaction of the *Sabbatino* decision and the Hickenlooper Amendment be finally resolved for the enlightenment of both the lower federal courts and the parties in subsequent litigation.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that a rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: March 27, 1968.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

VICTOR RABINOWITZ